

EQC/LJIAC EMINENT DOMAIN SUBCOMMITTEE

September 22, 1999

Final Minutes

SUBCOMMITTEE MEMBERS PRESENT

Sen. Mack Cole, Chair
Rep. Kim Gillan
Rep. Gail Gutsche
Rep. Monica Lindeen
Rep. Dan McGee
Rep. Jim Shockley

Sen. Spook Stang
Rep. Bill Tash
Mr. Tom Ebzery
Ms. Julia Page
Ms. Julie Lapeyre
Mr. Jerry Sorensen

COUNCIL MEMBERS EXCUSED

None

STAFF MEMBERS PRESENT

Krista Lee, EQC
Gordy Higgins, LJAC
Judy Keintz, Secretary

VISITORS' LIST

Attachment #1

COUNCIL ACTION

- Review, edit and adopt work plan.

I CALL TO ORDER AND ROLL CALL

CHAIRMAN COLE called the meeting to order at 1:30 p.m. Roll call was noted; all members were present with REP. LINDEEN and REP. MCGEE attending via teleconference.

(Attachment #2.) CHAIRMAN COLE explained that the Eminent Domain Study would be a joint process of the EQC and the Law, Justice, and Indian Affairs Committees. Three members from the Law, Justice, and Indian Affairs Committee will serve on the Eminent Domain Subcommittee. These members are: REP. DAN MCGEE, REP. JIM SHOCKLEY, and REP. GAIL GUTSCHE. The other members of the Subcommittee are EQC members.

II EMINENT DOMAIN "HAPPENINGS" AND "UPDATES"

MS. LEE related that the Four State Legislative Conference met last week. This conference includes Nebraska, North Dakota, South Dakota, and Wyoming. Proceedings from the

conference will be sent out to Subcommittee members. She added that the Interim Newsletter will contain an article on eminent domain.

III REVIEW AND DISCUSSION OF INFORMATION PACKET

■ Introduction

MR. HIGGINS referred to the Nature and Scope of the EQC Eminent Domain Study-HJR 34, **Exhibit 1**. The document explains the five bills introduced during the 1999 Legislative Session that were designed to make changes to the eminent domain statutes. He added that HJR 34 is quite broad in scope. It asks that the adequacy of the statutes be discussed in terms of legal constructs such as due process and just compensation. Eminent domain statutes have not been touched since 1983. These statutes may be inadequate to cover modern day issues. Once the adequacy of the statute has been investigated, the Subcommittee will need to consider whether or not revisions are necessary. The power of eminent domain cannot be avoided, but the rights of private property owners can be balanced with the rights of the general public through a careful investigation of the statewide policy impacts of past practices related to the condemnation of private property for public purposes.

■ MCA 1997

MS. LEE explained that Title 70, Chapter 30, MCA, is the main eminent domain law for the state. The authority to exercise the power of eminent domain has been delegated to various entities. Many of these have specific situations and/or conditions in which they can use eminent domain and are mentioned in numerous sections, which apply to the public use being addressed. A handout was provided to serve as a reference, **Exhibit 2**.

■ Court Cases

MR. HIGGINS recapped the Landmark U.S. and Montana Cases, **Exhibit 3**. The report contains some history and background about how the power of eminent domain has been exercised and what the courts say about the issue. The courts do not want to get involved in determining public use outside of the statutory constructs of legislation. There are cases where the court has held that the takings were excessive or the interest sought to be condemned is inappropriate. The idea of public use has been expanded dramatically. The western states look at eminent domain from the term of public benefit. Public use taken literally means that when property is condemned, the public actually has the right to use that property. This has changed in the early part of this century when expansion and development was progressing and the state needed property for infrastructure, waterways, mining, etc. In reviewing the historic Montana court cases, it is found that the courts usually agreed with the condemner. Montana Power Company v. Bokman, is a more modern case addressing public use. Cenex Pipeline LC v. Fly Creek Angus, Inc., involved six issues and is a good case to review. This addresses access,

excessiveness, appropriateness, etc. The need for an environmental assessment was also an issue. The court stated that nothing in the statute prohibits or allows for a permitting process prior to condemnation.

REP. TASH remarked that he has heard concerns regarding the inconsistency of compensation.

Randy Booth, Yellowstone Pipeline, questioned the number of condemnation cases in the last ten years. MR. HIGGINS remarked that he had not specifically research the number of cases.

REP. SCHOCKLEY remarked that most cases would not be reported because they are only reported if the condemnation is appealed.

MS. LEE remarked that eminent domain is a right that was inherent with statehood. The legislature's responsibility in defining law is to restrict the use of eminent domain.

■ **Processes**

MS. LEE presented a flowchart which clarified the process for condemnation, **Exhibit 4**. In Montana, the court decides whether the type of interest that is being taken is appropriate. The condemner then proceeds with a final offer to the condemnee. If this is rejected, the process then goes to the commissioners. The condemnee selects a commissioner, the condemner selects a commissioner, and those two persons select the third commissioner who is the chairman of the group. This group decides fair market value for the property. If the condemner appeals that decision, the process moves to court. In Montana, the process ends up in court twice. In other states arbitration takes place first.

Wally McRae, NPRC, questioned whether there were federal eminent domain laws. MS. LEE affirmed that there were federal eminent domain laws. If a state authorized entity or the state government is the condemner, state eminent domain laws would control. Federal condemnations would be for federal buildings, the interstate highway system, etc.

Mr. McRae remarked that a federal action that initiates the permit for public convenience and necessity allows the decision to be made a long distance from where the condemnation proceedings will be taking place. He suggested concurrence on a state or local level on whether or not the action represents public convenience and necessity in the state in which the condemnation procedures will occur.

■ Other States

MS. LEE related that staff chose western states for the preliminary report, **Exhibit 5**, and compared the differences in state laws. An example of some of the differences in laws is where Colorado requires a bond when pipelines are installed. Colorado also allows condemnation of private land for private use. Some states have formulas in place for computing compensation. Very few of the western states have had recent legislation. In South Dakota, recently passed legislation provided that any eminent domain condemnations need to be approved by the governor's office. She added in discussions with the South Dakota Legislative Services, it appears that this was set in place to stop one project.

MR. HIGGINS remarked that Virginia is also conducting an eminent domain study. They are basically addressing the compensation issue. They are interested in Montana's eminent domain statutes in terms of appraisal processes. In particular, they are interested in the appraisal of private property using the best and highest use criteria. Virginia selected Montana's laws as a standard to try to achieve. The Montana laws are being used as an example.

MS. PAGE commented that one of the issues the study should address is who has the right of condemnation. Alabama states that condemnation cannot be used for private entities, with exceptions. She asked for examples of different methods used by various states.

■ Historical Use

MS. LEE related that she tried to arrive at a broad spectrum of the different entities that have the power to exercise the right of eminent domain. She asked for information on actual condemnations within the last 50 years. Four entities responded. **(Exhibit 6)** She further asked for information regarding the ratio of property that was condemned per project.

Mr. McRae remarked that it is difficult to find an attorney to represent the condemnee in a proceeding. He believed that the numbers may be skewed. If the condemnee chooses not to settle, the property will still be taken away from him.

REP. MCGEE asked if information could be received from the various judicial districts in the state. MS. LEE affirmed that this would be another way of gathering information.

MS. PAGE remarked that the numbers reflect the persons who challenged the condemnation in court. The proposed legislation involved individuals concerned with due process and just compensation when their land was crossed.

Betty Thisted, NPRC, commented that she is aware of people who have felt helpless with the Montana Department of Transportation taking their property and not giving them a fair market price. The Department elaborated on the fact that the property owner had no choice. Information should be readily available about persons on a route whose property was crossed and she asked that this be included in the study.

REP. SCHOCKLEY remarked that this study should address two distinct types of condemnations which include governmental entities and private entities. He asked that these two types be segregated. He further remarked that if the person being condemned prevails, that person should be able to collect costs and fees.

SEN. STANG emphasized that the study should address whether a private entity should be allowed to condemn someone's property and how it is proven that the condemnation is a public need and necessity.

■ **Coordination**

MS. LEE explained that this includes information regarding whether easements are being shared. One group allows entities to use the same strip of land but they must negotiate their own easement with that landowner. If there are five different uses on one strip of land, is the impact less than having five entities with easements side-by-side?

REP. SHOCKLEY commented that he understands that fiber optic companies have placed cable without the consent of landowners. MS. LEE remarked that if the interest is fee simple, an entity such as the railroad can do anything they want with the land.

MR. EBZERY added that to obtain a fee simple title there would be a lot more scrutiny involved. There is a built in safeguard in the statute.

MR. SORENSEN remarked that a lot of the interstate property involves an easement used for fiber optics and other items. He questioned whether the Highway Department would have negotiated that right when the easement was obtained. MS. LEE added that Title 69 addresses the use of public right-of-way for utility lines and facilities. This includes state highways and gives utilities the right to use those easements.

■ **Current Issues**

MS. LEE reported that only a small amount of research was done on the Tongue River Railroad, Yellowstone Pipeline, and the Cenex case. Brief information was provided for the Subcommittee members.

Jeff Barber, Montana Environmental Information Center, requested that some of the affected landowners crossed by the three projects be surveyed.

CHAIRMAN COLE raised a concern about contacting these landowners since it would not be possible to contact all the landowners involved.

■ **Identified Concerns**

MS. LEE remarked that she had received a small amount of comment on this issue. She referenced two additional comment letters which have been received, **Exhibits 7 and 8**.

III COMMENTS

SEN. STANG maintained that the problems he sees involve due process, just compensation, and the need for bonding to pay for damages which may occur as property is crossed.

MS. PAGE remarked that the issue of appropriate use is very important. The eminent domain statutes were written in a different historical time. Some of the early laws were written to facilitate settling in Montana. One of the court cases she is aware of involves Cypress Mines using eminent domain to take over another mine. She urged a good debate on who has the right to condemn.

MR. SORENSEN raised a concern regarding persons who have been under the threat of eminent domain. He suggested mini case studies to review some of the issues involved.

REP. TASH offered his ranch as a case study. He has gone through the interstate highway acquisition process. This was not a negative process. He believes eminent domain is as necessary today as it was in earlier times to help the state realize its economic potential.

Mr. McRae commented that his ranch could also be a case study. They have been involved with condemnation on three occasions. One of this instances involved receiving a letter from speculators in Billings who had formed the Montana Water Storage Company. They proposed placing a dam across a creek and backing water onto his land. The first letter he received from them threatened condemnation if they failed in their efforts to negotiate. He found out that it is not necessary for an entity to state the purpose of the project for which they are seeking condemnation. This project did not move forward. He is concerned that the federal government may seek to expand the boundaries of the north end of Yellowstone National Park. He would like it to be necessary for the State of Montana to concur with any federal condemnation process.

Ms. Thisted encouraged the Subcommittee to change the slant of eminent domain so it would not weigh so heavily on those that are doing the condemning. The private landowner should have some of the same options that are available to federal lands which would include bonding. The private landowner should not have the weight of being up against such unworkable odds.

Mr. Barber believed the most important part of this study was the private versus public condemnation. He believed that private entities should not be able to condemn but added that he does not see this as a clear issue. He further remarked that North Dakota has a provision that a condemner, upon request of the condemnee, must provide a list of ten adjacent property owners and the offers extended.

Barry Billingsley, Nemont Telephone Coop, commented that Nemont Telephone Coop has never pursued a condemnation action. The public is aware that the coop has the right of condemnation and they do feel threatened. They deal with granted rights-of-way and do not purchase rights-of-way.

Don Allen, Western Environmental Trade Association, maintained that eminent domain was a big issue in the last legislative session. This study will require a balance of the need and necessity on one side and private property rights on the other side. They are willing to work on this issue and want to be part of the solution.

Dennis DeLong, Lincoln Electric Cooperative, remarked that cooperatives were started approximately 50 years ago and things were a lot different at that time. They have easements in their file that were signed but not notarized or recorded. They do not have easements for a vast majority of their feeder lines. In the past, people simply gave their word. They have never used condemnation. He raised a question regarding the status of an easement on a forty acre parcel which had been divided several times.

Gail Abercrombie, Montana Petroleum Association, encouraged the Subcommittee to keep in mind that there are horror stories on both sides of the issue. If something is done to address the exceptions, it may not prove to adequately serve the rule.

Mr. Booth, Yellowstone Pipeline Co. remarked that Montana has a very good condemnation law. It has been tested through the court system. They want to be a good neighbor and their goal is zero condemnation.

Barbara Ranf, US West, voiced a concern about specific projects that involve emotional issues. In the attempt to amend the law to address these issues, companies like US West are also

affected in their ability to provide services in this state. People want high speed internet and data connections.

Bob Zimmerman, Cabinet Resources Group, remarked that the report on landmark cases spoke to protecting the rights of Montana property owners as well as providing for the general public benefit. The history of eminent domain shows that this issue is heavily weighted toward the corporate side of the issue. He added that the greatest public good is not necessarily commerce.

Mr. Booth, Yellowstone Pipeline Co., asked the Subcommittee to discuss a reasonable time for a written offer to be refused.

IV DRAFT WORK PLAN DISCUSSION

The Subcommittee reviewed the draft work plan, **Exhibit 9**.

1. It was recommended that the information be segregated into government and private condemnations. Case studies on people being intimidated were suggested. This would involve projects that have been concluded. Practices in other states should be reviewed, especially in the area of bonding. Another suggestion was to study legal implications of an easement for liability purposes as opposed to fee simple in regard to a landowner. The idea of limiting some of the entities that can condemn land was suggested. This would involve reviewing statutes in the western states.
2. A concern was raised regarding abandoned property. What happens to the landowners closest to the property? The reversion of abandoned property by the Montana Department of Transportation was noted. Mitigation measures on public versus private land was recommended as well as the use of best technologies.
3. It was suggested that the review of court cases show how many cases had been ruled in favor of the landowner. This could be narrowed to particular issues.
4. It was recommended that the state of Alabama be included in this comparison. Of particular interest is the issue of who has the right to condemn. Specific issues in other states will be reviewed but the broad aspect of eminent domain statutes will be contained to the 11 western states.
5. This may be revisited at a public hearing.
6. This will remain as part of the work plan.
7. Completed.
8. Requested that EQC hold their December and January meetings in Missoula and Billings so that public meetings can be held in conjunction with EQC meetings.

CHAIRMAN COLE explained that the plan is to have both MEPA Subcommittee and Eminent Domain Subcommittee meetings and public hearings on the same days in conjunction with the full EQC meeting. Additional funding may be needed. There was a concern that December and January may be premature for public hearings.

MS. LEE maintained that when notices went out for public hearings it was important that the purpose of the hearing be stated. The Subcommittee would need focused information prior to the meetings.

MR. SORENSEN raised a concern that these public hearings could turn into Yellowstone Pipeline and Tongue River Railroad public hearings. He questioned whether that would be helpful to the study.

MR. EBZERY suggested that focusing on specific subjects would facilitate the discussions. Subjects that might be of interest could include bonding, reversions, legal implications behind easements, federal eminent domain authority, etc.

CHAIRMAN COLE agreed to having specific subjects on the agenda but added that public comment may include new issues.

REP. MCGEE remarked that the public hearings should be wide open. The resolution is very broad and states that everything about the eminent domain statutes should be studied. The Subcommittee members need to hear all the issues that concern the public.

CHAIRMAN COLE maintained that the Subcommittee needs to make sure that certain subject areas are covered in the public hearings so that input is received from the public on these items. It is important to have specific areas for discussion to allow for structure at the meetings.

MS. LEE questioned whether more public hearings may be necessary. EQC meetings are set for December 2nd, January 21st and March 24th.

CHAIRMAN COLE remarked that if the Subcommittee was ready for a public hearing in December, there may be a possibility of holding an additional public hearing.

SEN. STANG insisted that all EQC meetings are public meetings. He added that by traveling around the state more people are able to provide input on the issues.

REP. TASH agreed and added that it is helpful for the public when they can make comment on issues relative to their particular areas. He complimented the staff on the amount of comprehensive information that had already been provided to the Subcommittee members.

MS. LEE remarked that she had envisioned holding the Subcommittee meetings in the afternoon and having a three hour public hearing in the evening. Press releases would be very important to insure good attendance at the hearings.

SEN. STANG claimed that an evening meeting would allow for better attendance by the public.

9. MR. HIGGINS remarked that a guidebook which includes descriptions and history would alleviate some of the confusion regarding eminent domain statutes. This could be separate from the final report and any recommendations for legislation. The guidebook could be updated as necessary. The Subcommittee agreed that this would be a beneficial product.

SEN. STANG added that this guidebook could include information for the general public regarding an instance of being approached by an entity regarding eminent domain. It could include the landowner's rights and names and numbers of who to contact for information.

MS. LEE summarized the tasks as follows:

1. Look at the number of condemnations that have occurred and separate these out by governmental entities versus private entities.
2. Conduct two case studies on concluded projects. Express Pipeline was suggested.
3. Research the bonding issue and how other states are handling the same.
4. Review liability issues on interests taken - fee simple versus easement.
5. Look at the entities which have the authority to exercise eminent domain and compare this to other states to include the 11 western states and Alabama.
6. Review the federal/state relationship on eminent domain.
7. Research the reversion of property statutes.
8. Consider mitigation measures on public lands versus private lands as well as the use of best technologies.
9. Research court cases. REP. LINDEEN will provide information on specific issues to be reviewed.
10. Identify specific issues for further study.
11. Public hearings
12. Handbook

**Motion/Vote: REP. LINDEEN MOVED TO ACCEPT THE EMINENT DOMAIN
SUBCOMMITTEE REVISED DRAFT WORK PLAN. THE MOTION CARRIED UNANIMOUSLY.**

V ADJOURNMENT

There being no further business, the meeting adjourned at 5:00 p.m.

SEN. COLE, Chairman